Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the aftermath of this Court's decision in *Alden v. Maine*, can the Commonwealth of Virginia, which does not have immunity for its contracts with its employees, deny the Petitioners due process of law by taking Petitioners' wages?

2. Are the rights afforded an employee under the Fair Labor Standards Act contract rights?

3. Can Virginia violate the Supremacy Clause by removing state court jurisdiction granted by Congress in the Fair Labor Standards Act?

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STATEMENT OF JURISDICTION

Petitioners seek review of the Supreme Court of Virginia's denial of discretionary review of Petitioners' Petition for Appeal, dated June 5, 2000. Jurisdiction in this Court is vested by reason of Article III, U.S. Constitution, Amendment XIV, U.S. Constitution, 28 U.S.C. §§2102(b), 2104, and Rule 13.1 of the Rules of the Supreme Court of the United States, as this Petitioner requests review of a final order from the highest court of a state, the Supreme Court of the Commonwealth of Virginia, and involves a federal question: whether the Commonwealth of Virginia, by its agency, denied Petitioners their United States Constitutional guarantee of due process prior to any taking of their property.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, U.S. Constitution:

* * *

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

* * *

Amendment XIV, U.S. Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

29 U.S.C. §216(b):

(b) **Damages; right of action; attorney's fees and costs; termination of right of action.** Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS §215(a)-(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [20 USCS §215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in

the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS §217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS §215(a)(3)].

Code §2.1-116.06 of the Code of Virginia (1950), as amended:

§§2.1-116.06. Grievances qualifying for a grievance hearing; grievance hearing generally

* * *

C. Complaints relating solely to the following issues are not grievable and shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and

personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

(Amended in 1996 to delete "are not grievable and" after "the following issues".)

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari for redress of their state employer's denial of due process in their claim for unpaid contractual wages. After *Alden v. Maine*, employees deprived of wages claims, including wages owing through the Fair Labor Standards Act (hereinafter "FLSA"), could sue their state employer only if the state is not immune or the state waived immunity. *Alden v. Maine* did not relieve states of their obligations under the Fair Labor Standards Act, did not render the states immune from suits by the federal government and did not attempt to decide whether states are immune from suits by its employees. Immunity from suits by employees was left as a matter of state law. Virginia, by its well-established case law, statutory enactment and the rule of this case, is not immune from contract actions by its employees for unpaid wages. In this case, however, Virginia also argues that its employees' claims are the exclusive subject of state personnel procedures, which Petitioners say are unconstitutional.

This is a consolidated[1] appeal from the Supreme Court of Virginia's denial of a Petition for Writ of Appeal to the

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[1]The cases consolidated are *Dougall v. George Mason University*, Law No. 178905, *Foster v. George Mason University*, Law

[footnote continued]

Circuit Court for the County of Fairfax. Petitioners are current and former police officers and dispatchers for George Mason University in its campus police department. Their causes of action arise from intentional violations of Respondents' agreement to compensate Petitioners all hourly compensation due them, both at their normal hourly rate and, when applicable, their overtime hourly rate.[2] In addition, Petitioners sought additional unpaid compensation for "moonlighting", where Respondents failed to compensate Petitioners money collected for work Petitioners performed for outside vendors.

The cases involve two (2) material proceedings based on original Motions for Judgment that contained four (4) counts, styled in the nature of contract claims with additional counts for violations of the Fair Labor Standards Act (Counts III and IV). The Petitioners primarily sought money damages for earned but unpaid pay and overtime pay. The first material proceeding was a hearing on August 26, 1999, when the court below granted a plea of sovereign immunity in favor of Respondents concern-

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No. 178906, *Allan-Logan v. George Mason University*, Law No. 178907, *Rodriguez v. George Mason University*, Law No. 178908. The Supreme Court of Virginia identified these cases by Record Number 000496. Identical issues were disposed simultaneously in the Circuit Court on the same days. While the court below issued no formal order consolidating the cases, at all times relevant to the issues presented to this Court, the issues were argued and decided together. Pursuant to 12.4 of the Rules of the Supreme Court of the United States, a single Petition for Certiorari is submitted.

[2] In their initial and amended complaints, the Petitioners alleged their damages in excess of $15,000, which is within the exclusive and original jurisdictional limit of circuit courts in Virginia. *See* §16.1-77(1) and §17.1-513 of the Code of Virginia (1950), as amended.

ing the Fair Labor Standards Act counts,[3] and sustained demurrers to claims of attorney's fees, interest, and punitive damages. The Petitioners amended their Motions for Judgment to the extent permitted by the trial court, which left only the cases styled in the nature of contract claims. The second proceeding was a hearing on December 9, 1999, when the court below overruled Respondent's demurrers that Petitioners had failed to allege contract actions and failed to comply with Virginia's contract claim statute. In addition, the trial court denied Respondents' plea of sovereign immunity as to those contract claims. However, the trial court sustained Respondents' demurrer that Virginia's personnel laws were the exclusive remedy for Petitioners.

The result of the trial court's action was to rule that while the Petitioners have properly alleged a breach of contract claim against the Petitioners for which Virginia is not immune, Virginia's personnel laws preclude any right to have any judicial review concerning those breaches. This left Petitioners without any remedy. The Petitioners used what personnel law procedure was available – a protest to their supervisors who denied the claim without any hearing and a denial by Respondents' administrators of those contract claims. At no time were Petitioners offered an unbiased tribunal to adjudicate their claims, nor was there any notice of the Respondents' proposed action or any grounds for that action, nor any

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[3] This ruling was based on this Court's holding in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

opportunity to present reasons and witnesses why that action should not be taken, nor any right to have counsel in those proceedings, no record was ever made of those proceedings, no statements were ever made stating the reason for those decisions, and there was never any judicial review of those decisions. All these were barred by the trial court's interpretation of Virginia's personnel law. As a factual matter, Respondents have taken Petitioners' money and labor without paying for it.

ARGUMENT

The court below determined that while there is no sovereign immunity for the contract claims, those claims were nonetheless precluded from judicial review in Virginia courts because of the Virginia Personnel Act.[4] Assuming the Virginia Personnel Act is the only state remedy, that remedy is unconstitutional because it fails to afford the Petitioners the minimum due process guaranteed them by Amendment XIV of the United States Constitution. The Virginia Personnel Act only provides Petitioners a complaint to supervisors but explicitly bars any hearing on Petitioners' unpaid wage claims. When the court below ruled that this Act was the exclusive remedy for the Police Officers' claims, the effective ruling was that there was no judicial review available since Virginia's circuit courts lack jurisdiction to hear the Police Officers' claims. The University is unjustly enriched without judicial review of its conduct, and the

[4]Hereinafter, the "VPA." The court below did not decide whether the FLSA remedies were precluded by the VPA since those counts were dismissed solely based on immunity. Virginia state courts are the only forum available to the Police Officers since they cannot seek redress in federal courts. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

University has taken the property of the Police Officers without due process of law.[5]

The Police Officers seek judicial review of their contract claims. The University attacked the Police Officers' claims by interposing a demurrer arguing that the VPA is an exclusive remedy. In reply to that demurrer, the Police Officers asserted that the University's position would impose an unconstitutional taking without due process of law. The Police Officers' claims are not a direct action for taking without due process, but of breach of contract, claims considered well-pled by the court below. Appendices B through F, and G. Thus, the issue of constitutional taking without due process is not raised by direct claim; rather, the issue is raised as a reply to the demurrer raised by the University.[6]

There is no clearly established bar in the personnel laws to constitutional claims. *Johnson v. Robison,* 415 U.S. 361, 367, 94 S.Ct. 1160, 1165, 39 L.Ed.2d 389 (1974). "Serious constitutional questions" arise when an act is construed to bar judicial review of constitutional claims. *Johnson v. Robison,* 415 U.S. 361, 366-367, 94 S.Ct. 1160, 1165-1166, 39 L.Ed.2d 389 (1974). The only dismissal is when the constitutional claim is "essentially fictitious", "obviously frivolous" and "obviously without merit". *Hagans v. Levine,* 415 U.S. 528, 537, 94 S.Ct. 1372, 1379, 39 L.Ed.2d 577 (1974); *Buchanen v. City of Chesapeake,* 237 Va. 50, 53, 375 S.E.2d 736 (1989) (Apparently applying this standard). There is no doubt that the Police Officers' claims have merit, due to the amount sought and because their cause of action

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[5]This argument was raised in the court below as to the exclusivity of the VPA.

[6]As a reply, the issue is not one to be raised by amendment to the Motions for Judgment.

is well-pled. Even if a statute such as the VPA could preclude ordinary review, such preclusion must give way when constitutional issues are involved. *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053 (1988); *Bowen v. Michigan Academy of Family*, 476 U.S. 667, 670-673, 106 S.Ct. 2133, 2135-2137 (1986). In the past, these issues were raised through the defense of precluded judicial review. *Webster, supra* at 2050; *Bowen, supra* at 2135, and not as a part of the complainant's case. *See also City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788, 790 (1951) (City personnel ordinance which barred judicial review does not bar such review when constitutional issues involved).

In summary, Virginia cannot deny judicial review of the Police Officers' contract claims. To do so permits the Commonwealth's agency to take labor without compensation.

I.

THE PETITIONERS' CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS WERE TAKEN WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS.

A. By Well-Established Rules, Virginia is Not Immune From Its Personnel Contracts.

The trial court ruled that there is no sovereign immunity for contracts Virginia enters into with its employees. App. G, p. 66a. ("The plea in bar, paragraph five, regarding the immunity of the commonwealth, the plea is overruled because the Commonwealth is not immune from suit in contract. . .") This ruling is the rule of the case, but is well-supported by Virginia case decisions and statutory enactment.[7]

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[7]The Commonwealth never excepted from the trial court's ruling on this issue.

Section 8.01-192 of the Code of Virginia (1950), as amended, provides for Virginia's general consent to suit in contract. This enactment codifies Virginia's long established acceptance of suit by its citizens. The Supreme Court stated that "since 1778, the 'cherished policy of Virginia' to allow to citizens 'the largest liberty of suit against herself' in contract cases." *Wiecking v. Allied Medical Supply Corp.*, 239 Va. 548, 552-3, 391 S.E.2d 258 (1990) (Citing *Higginbotham's ex'x v. The Commonwealth*, 66 Va. (25 Gratt.) 627, 638 (1874)). In *Wiecking, supra*, the Virginia Supreme Court stated:

> [While the] doctrine is "alive and well" in Virginia, as a defense to actions in tort, *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984), but we have never extended that defense to actions based on contracts entered into by duly authorized agents of the government.

239 Va. at 551, 391 S.E.2d at 260. The reasons were:

> when the state contracts for goods or services, receives the benefit of the contract, and then refuses to honor its obligations, the contractor's property is subjected to an unconstitutional taking without just compensation, . . . a denial of liability under such circumstances also violates state and federal due-process guarantees, . . . to hold a state may enter into a valid contract and yet retain the power to avoid its obligations would entail an obvious contradiction; neither the state nor the contractor can be bound, yet not bound, by a single contract, . . . the courts will not permit the government to exercise "bad faith and shoddy dealing," . . . and relegating the injured party to an appeal for justice to the legislature in the form of a private bill of relief is to offer a "doubtful remedy" . . .

239 Va. at 551-552, 391 S.E.2d at 260 (citations omitted). Simply stated, immunity is not relevant to Petitioner's contractual claims. Rather, the rationale – that there is otherwise an unconstitutional taking – underpins the lack of immunity in actions *ex contractu* against the Commonwealth and that rationale and specific allegation of a taking is not required.

B. *Alden* Does Not Grant Virginia Immunity.

The Supreme Court of the United States did not create for the Commonwealth of Virginia sovereign immunity when *Alden* was decided. The *Alden* decision assumed Maine and all states were immune and decided if that immunity could be abrogated by the Fair Labor Standards Act. It stated:

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment Immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today* * * *

Alden, 527 U.S. 706, 119 S.Ct. 2240, 2246-7, 144 L.Ed.2d 636 (1999). As is demonstrated by cases such

as *Wiecking, supra,* Virginia never had immunity for suits in contract and does not retain any immunity for such suits today.

Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) holds "the States ***retain*** immunity from private suits in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* 119 S.Ct. at 2267 (emphasis added). The *Alden* decision then discussed "the central reason given by the founders who chose to ***preserve*** the States' sovereign immunity." *Id.* (emphasis added). It assumed state immunity and only inquired as to whether the State of Maine waived immunity or consented to suit.[8] *Id.* at 2246-7, 2268. Rather it inquired as to the issues raised in that appeal: 1) if the appellants had a right to sue because the FLSA was the "supreme Law of the land" and, 2) "states cannot choose to discriminate among litigants on the basis that federal law furnishes their underlying right". Brief for Petitioners, *Alden v. Maine,* No. 98-436 at 3-5 (January 7, 1999). The United States Supreme Court's decision was only as to those arguments and it stated "Petitioners have not attempted to establish a waiver of immunity under this standard [consent to suit]" *Alden,* 119 S.Ct. at 2268. The Commonwealth herein cannot establish immunity because no such immunity exists for contractual claims in Virginia and the Commonwealth long ago agreed to suits *ex contractu.*

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[8]Similarly, the United States Supreme Court, in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), assumed Florida's sovereign immunity because Florida is "nonconsenting".

C. The Virginia Personnel Act Provides Petitioners No Constitutionally Adequate Remedy.

The Virginia Personnel Act does not provide for a grievance, judicial review, unbiased administrative review, or any remedy at all. Rather, it establishes a merit personnel system for state employees and sets a policy of "objective methods of appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment." §2.1-110 of the Code of Virginia (1950), as amended [hereinafter "Code"], and it authorizes the Governor to establish, administer and amend a uniform compensation plan and to provide rules to govern *minimum* hours of work, but gives no remedy if he does not. The VPA only provides a basis to interpret Title 2.1, Chapter 10.01, 2.1-116.01 *et seq.*, Code of Virginia (1950), as amended, "The Department of Employee Relations Counselors" [hereinafter "DERC"] and Title 2.1, Chapter 10, §2.1-114.3, Code of Virginia (1950), as amended, "Department of Personnel and Training" [hereinafter "DPT"] statutes, but the VPA has nothing to do with remedies or exclusivity of the DERC grievance process or DPT policy[9] and/or review of its policy.

The remedy for a discharged state employee is the grievance procedure found in DERC. However, not

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[9]The VPA established the Department of Personnel and Training and it was created to set policy. However, the Director of the DPT "shall have no authority with respect to the state grievance procedures." Code §2.1-114.5.13. DPT establishes the policies which implement the purposes of the VPA – the "objective methods", Code §2.1-110 – and those policies are subject to limited judicial review. *Murray v. Stokes*, 237 Va. 653, 657, 378, S.E.2d 834 (1989). The exclusivity, or limited review of DPT policy, has nothing to do with the Police Officer's contract claims and no remedy is sought for DPT policy. No DPT policy is challenged by the Police Officers in these cases.

every issues, including the ones in these cases, are subjects of the state grievance procedure. As the Commonwealth conceded, "If this was solely about wages, it would appear not to be grievable." App. G, p. 58a. Only those complaints listed in Code §2.1-116.06.A are subject to a grievance. As to all others, "Management reserves the exclusive right to affairs and questions of state government." Code §2.1-116.06.B. Code §2.1-116.06.C. states, "Complaints relating solely to the following issues are not grievable and shall not proceed to a hearing:[10] (i) establishment and revision of wages, salaries, position classifications and general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be part of the job content * * *". The disputes in this case do not relate to the establishment and revision of overtime wages, other wages and general benefits. Rather, Petitioners accept the wage scale set for them and there is no issue of revising that pay scale. Nothing in Petitioners' pleadings questions the establishment or revision of wages. Rather, the issues are only the University's failure to pay those wages.[11] The University asserts that the Petitioners must grieve these disputes, but under this generally applicable law they cannot because it is not the subject matter of the Police Officers' dispute and is not grievable. *See* Code §2.1-116.06.C.

The Police Officers used what grievance process was made available to them – an informal grievance process.

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[10] A 1996 amendment changed this sentence to "Complaints relating solely to the following issues shall not proceed to a hearing * * *".

[11] The University argued below that the dispute is defining "work" under the University policies. However, the University offered no DPT policy which defines work.

Code §2.1-116.05.A & B. However, the informal process ends because there is no right to a hearing. Code §2.1-116.06.C.

The VPA, DERC and DPT were passed by the Virginia legislature to address the due process property rights in state employment – that is, the state employment is a vested or property right which cannot be taken without due process. *See, e.g., Mandel v. Allen,* 81 F.3d 478, 481 (4th Cir. 1996), *Garraghty v. Com. of Va., Dept. of Corrections,* 52 F.3d 1274, 1281 (4th Cir. 1995), *Detweiler v. Com. of Va. Dept. of Rehab. Sys.,* 705 F.2d 557, 558-9 (1983). It was the protection of this additional constitutional guarantee that motivated the passage of these acts. These acts' minimal rights to hearing and opportunity to be heard are intended to provide that protection. These acts were not intended to take away common law contract rights of employees and supplant them with other rights. The trial court's interpretation that the VPA is the exclusive remedy ignores the fact that the VPA's remedies fail to provide those minimal rights when employee property is taken. Because the VPA does not meet the basic requirements of due process, it is unconstitutional.

D. The Compensation Due Petitioners is a Protected Property Interest.

In order to fall under the protections afforded by the Due Process clause of Amendment XIV of the United States Constitution, there must be a protected interest rather than a mere expectancy. "Certainly all of the traditional forms of real and personal property fall within this definition [of property]." Rotunda, Ronald D. and Nowak, John E., *Treatise on Constitutional Law,* Vol. 3, §17.5. Despite Respondents' argument that "I don't

think that in Virginia there is a property right in a state employee to be paid FLSA overtime.", App. G., p. 58a, Petitioners have a contractual right to be compensated as promised by the Respondents, a well-established property right and protected interest in their wages. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (Interest on client's funds is protected private property); *Leis v. Flynt,* 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (Claims to property right or entitlement must come from state law); *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 340, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) ("We deal with wages – a specialized type of property presenting distinct problems in our economic system.")

E. Once a Protected Right Exists, There are Minimum Guarantees Virginia Must Provide.

Since Respondents have established a protected property interest, there are minimum rights and guarantees that a state, or its agency, must provide. These include notice and hearing, usually pre-deprivation. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1960); *Board of Regents v. Roth,* 408 U.S. 564, 569-570, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Due process may be satisfied post-deprivation when there is a meaningful post-deprivation remedy available. *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In this case, there was no pre-deprivation hearing and the post-deprivation remedy is not meaningful.

Obviously, the Petitioners' complaints to their supervisors do not satisfy the minimum requirements of due process because their supervisors, charged with the responsibility to pay them, are biased. Under VPA, there was no opportunity to have their claims heard by an unbiased decision maker. This violates the constitutional requirements of due process. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

F. Virginia Failed to Afford Petitioners those Minimal Rights Guaranteed by the 14th Amendment.

Because of the nature of Petitioners' contract claims, Virginia, through the VPA and DERC, has failed to provide any due process guarantees, let alone minimum guarantees. By reviewing their own conduct and precluding judicial review, the Respondents have violated the basic tenets of the 14th Amendment. In *Hudson v. Palmer*, this Court found that prisoners had a right, post-deprivation, to use the courts to redress that deprivation. *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Petitioners, police officers, are seeking the same remedy. Yet Petitioners allege that the failure to pay their earnings when the work is performed was intentional and part of Respondents' policy not to pay them these earnings. That is, the deprivation was not negligent, but an intentional policy of George Mason University. Therefore, the Respondents cannot rely on a claim that a post-deprivation remedy exists. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed. 265 (1982).

II.
AS A MATTER OF FEDERAL LAW, THE RIGHTS AFFORDED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT ARE CONTRACT RIGHTS.

The duties claimed by the Police Officers arise from contracts for employment between the Police Officers and the University. By well-settled rules of both federal law and Virginia common law, the duties imposed on the University by the Fair Labor Standards Act provide for additional contractually-based rights or are implied into that contract for employment. Virginia and the University enjoy no sovereign immunity for actions based on their contracts. While the University may defend the imposition of implied duties which are *ex delicto*, based on soversign immunity, the duties imposed and/or implied by the Fair Labor Standards Act are *ex contractu*. This is shown by the long-standing jurisprudence in Virginia concerning contract claims against her and this Court's cases concerning the Seventh Amendment right to a jury trial. Because the duties that are imposed on the University are contractually based, the University does not enjoy the protection of sovereign immunity and must pay the Police Officers the compensation owed them.

A. The Legal Relationship Between the Police Officers and Their Employer Is Based in Contracts for Employment.

"The relationship of employer and employee can only exist by virtue of contract, express or implied." *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 97, 135 S.E. 890, 891 (1926); *See Sartin v. Mazur*, 237 Va. 82, 375 S.E.2d 741 (1989); *Monaham v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996). More specifically, as to the

Police Officers, the contracts were entered into by authority of the Virginia legislature. Code §23-236.B. Indeed, Virginia courts routinely express employer/employee duties and performance of those duties as contractually based. For example, "Virginia applies the common-law rule that an *employment contract* is presumed to be terminable at will. . . ." *Graham v. Central Fidelity Bank*, 245 Va. 395, 398, 428 S.E.2d 916 (1993) (*Citing Bowman v. State Bank*, 229 Va. 534, 535, 331 A.E.2d 797, 798 (1985) (emphasis added); *Buchanen v. City of Chesapeake*, 237 Va. 50, 375 S.E.2d 736 (1989) (Claim by city police for overtime is "a simple contract dispute" with a "contractual basis." *Id.* at 53. After bench trial, circuit court's decision that claimant's proof was insufficient to establish overtime as contract term upheld. *Id.* at 52); *Fun v. Virginia Military Institute*, 245 Va. 249, 427 S.E.2d 181 (1993) (Librarian's contract with VMI interpreted by court); *Underwood v. Henry County School Bd.*, 245 Va. 127, 427 S.E.2d 330 (1993) (County teacher's contract claim superceded by specific statutory reduction in force); *Falls v. Virginia State Bar*, 240 Va. 416, 397 S.E.2d 671 (1990) (Employee of state agency claim for breach of contract barred by statute of frauds); *Spotsylvania School Board v. McConnell*, 215 Va. 603, 212 S.E.2d 264 (1975) (Teacher's dismissal upheld as right to breach in contract because statutory rights of employer to dismiss, as the law in existence at formation of agreement, incorporated into contract). Thus, by well-settled law, the source of the duties between the University and Police Officers are duties imposed by the terms of contracts for employment. The trial court recognized this contractual relationship in overruling the Respondents' demurrers related to the contract claims.

B. Petitioners' Contracts for Employment Include the Fair Labor Standards Act As a Term.

The provisions of the Fair Labor Standards Act with respect to minimum wages, overtime compensation and liquidated damages are to be read into and become part of every employment contract subject to the act. *Roland Elec. Co. v. Black,* 163 F.2d 417, 426 (4th Cir. 1947), *cert. denied,* 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 (1948). By statutorily imposing into the Police Officers' employment contracts FLSA requirements, Congress extended the rights of all employees, including state employees to seek the remedies for violations of the FLSA. Only if a state is immune from suits to enforce contacts it made, can those rights be denied by state courts.[12]

C. Alternatively, The Fair Labor Standards Act Is an Action *ex Contractu* at Common Law.

It is long established that the FLSA claims are contractual claims. Under Virginia law, contractual claims include the common law action of debt. §73, *Burks Pleading and Practice* (4th Ed. 1952). " '[The action of debt's] distinguishing and fundamental feature consists in the fact that it lies for the recovery of *money,* or its equivalent, in sums certain, or that can be readily ascertainable by actual computation.' " §74, *Burks Pleading and Practice* (4th Ed. 1952) (emphasis in original). The action of debt includes the recovery of statutory penalties as well. §§74, 76, *Burks Pleading and Practice* (4th Ed. 1952). Thus, the Petitioners' FLSA action is

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[12] In prior United States Supreme Court decisions, the Court held that a state is immune from suit by its own citizens when the suit is in federal courts. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

an action of debt, a claim *ex contractu.*[10] *See also Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing Co.,* 185 F.2d 457 (5th Cir. 1950).

D. The Right to a Jury Trial for Claims Arising Out of Violations of the Fair Labor Standards Act Demonstrates such Claims are *ex Contractu.*

The right to a jury trial for claims pursuant to the FLSA demonstrates that such actions are based in contract claims. "[I]t was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held." *Lorrillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) (*Citing Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing Co.,* 185 F.2d 457 (5th Cir. 1950); *Olearchick v. American Steel Foundries,* 73 F.Supp. 273, 279 (W.D. Pa. 1947); *and* Note, The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts, 44 U. Chi. L. Rev. 365, 376 (1977); Note, Fair Labor Standards Act and Trial by Jury, 65 Colum. L. Rev. 514 (1965)).

The right to a jury trial is based on the Seventh Amendment of the United States Constitution when actions are "clearly analogous to the 18th-century action in debt", *Tull v. United States,* 481 U.S. 412, 420, 107 S.Ct. 1831, 95 L.Ed. 365 (1987) (*reversing United States v. Tull,* 769 F.2d 182 (4th Cir. (Virginia) 1985), and applies to

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[10] See *Wiecking v. Allied Medical Supply,* 239 Va. 548, 552, 391 S.E.2d 258, 260 (1990) (*Citing Hatzlachh Supply Co. v. United States,* 444 U.S. 460, 466, 100 S.Ct. 647, 651, 62 L.Ed.2d 614 (1980)), which states contract claims include even contracts implied in fact which contain elements of a tort.

causes of action created by congressional enactment. *Id.* at 417. (Citing *Curtis v. Loether,* 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974)). The Police Officers' causes of action are based on the action in debt, Part IIB, *supra.* Furthermore, courts consider the FLSA as based on an action in debt. *Wirtz v. Jones, supra; Lewis v. Times Publishing Co., supra; Olearchick v. American Steel Foundries, supra.*

III.
THE SUPREMACY CLAUSE BARS VIRGINIA FROM ALTERING FEDERAL LAW.

The Supremacy Clause, Art. VI, U.S. Constitution, clearly mandates that properly enacted federal law is the supreme law of the land. By interpreting its own laws to bar any judicial review of Fair Labor Standards Act claims, Virginia has violated that mandate. As is shown above, Virginia is not immune for its breach of contracts, including violations of the Fair Labor Standards Act, which is a contractually based cause of action. By removing the remedy afforded by 29 U.S.C. §216(b), to enter "any . . . State court of competent jurisdiction", the trial court violated the Supremacy Clause.

This case raises issues unlike those raised in *Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), since the nature of the sovereign immunity superceded considerations of the Supremacy Clause. Rather, Virginia has never been immune for contract actions so there is no preserved sovereign immunity to consider.

CONCLUSION

Virginia's personnel act precludes any judicial review and any meaningful pre- or post-deprivation remedy. That preclusion violates the 14th Amendment's guarantee of due process. In addition, the Petitioners' Fair Labor Standard Act claims are contract claims which were barred by the same decision which precluded any review. Because Virginia is not immune from its contracts, the full rights and responsibilities imposed by the Fair Labor Standard Act are imposed on Virginia. This Court should grant Petitioners a writ of certiorari to determine that Virginia failed to provide the Petitioners due process before Virginia took Petitioners' protected property interest.

Respectfully submitted,

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